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NO. 82-2125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and
RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

BRIEF IN OPPOSITION TO THE MOTION OF APPELLEES KOCH AND THE CITY OF NEW YORK AND THE STATE TAX COMMISSION TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
POINT I—Import-Export Clause	3
POINT II—Commerce Clause	6
POINT III—Supremacy Clause	8
POINT IV—Equal Protection Clause	10
CONCLUSION	11
APPENDIX	1a

PAGE

Table of Authorities

Cases Cited

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 11

Bacchus Imports, Ltd., et al. v. George Freitas, Director of Taxation of the State of Hawaii, Filed March 15, 1983, Docket No. 82-1565 2

Community Communications Co. v. City of Boulder, 455 U.S. 40, 103 S.Ct. 835 9

Mancini v. McLaughlin, 54 NY2d 860, amd. 54 N.Y. 2d 863 8

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 7

Nippert v. Richmond, 327 U.S. 416, 429 at n.19 6

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) 7

Patapsco Guano Co. v. Board of Agriculture, 371 U.S. 191 (1898) 6

Wheeling Steel Corporation v. Glander National Distillers Products Co. v. Glander, 337 U.S. 562 11

United States Constitution Cited

Article I, Section 8, Clause 3 ..... 2, 6

Article I, Section 10, Clause 2..... 2, 3

Article VI, Clause 2 8

Fourteenth Amendment, Section 1 10

Twenty-first Amendment 8

PAGE

Statutes Cited

L. 1960, Ch. 316 (McKinney's Session Laws of New York, 1960):

Secs. 2, 6, pp. 520, 522 4

L. 1971, Ch. 406 (McKinney's Session Laws of New York, 1971):

Sec. 1, p. 572 5

L. 1978, Ch. 433 (McKinney's Session Laws of New York, 1978):

p. 741 5

Sherman Act 10

Tax Law:

Sec. 171-a 5

Sec. 435 5

Sec. 445, Art. 18 3

Other Authorities Cited

Assembly 8082 5

Bulletin No. 529 8

Editorial, The New York Times of April 17, 1964 6

1971 Legislative Index:

pp. S683, A788 5

Local Law No. 30 ..... 3, 5, 8

PAGE

Senate 7049 5

Tariff Schedules of United States Annotated (1981):

Schedule I, Part 12, Beverages 5

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Appellants respectfully direct the attention of the Court to the case presently pending before this Court which is very similar on its facts and involves the same basic principles of constitutional law as those on this appeal. The reference is to an appeal from the Supreme Court of Hawaii in *Bacchus Imports, Ltd., et al.* v. *George Freitas, Director of Taxation of the State of Hawaii,* Filed March 15, 1983, Docket No. 82-1565; in which the Court noted probable jurisdiction on June 20, 1983 (52 L.W. 3069).

The questions involved in *Bacchus Imports, Ltd., et al.* are:

1. Does a state tax of 20% on the sale at wholesale of all liquor sold in Hawaii, which singles out (by exemptions for locally produced liquors) imported liquor for discriminatory taxation, constitute a duty or impost on imports prohibited by the Import-Export Clause (U.S. Const., Art. I, §10, cl. 2)?

2. Does such a discriminatory state tax, imposed for the purpose of fostering and protecting certain local liquor industries, infringe unconstitutionally on the power of Congress under the Commerce Clause (U.S. Const., Art. I, §8, cl. 3)?

3. Does such a discriminatory state tax, by exempting from the tax certain locally made liquors while taxing other liquors imported into Hawaii by appellant wholesalers, deny to them the equal protection of the laws?

The fact that these two cases so similar on their facts and principles of constitutional law should almost simultaneously reach this Court is extraordinary, given the inertia of federal-state relations on the side of localism. In the past it has been the function of the Court to put the inertia on the other side; on the side of nationhood and union.

At the threshhold the appellees move to dismiss the appeal or, alternatively to affirm on the ground that there is no substantial federal question, and "that the questions presented are so manifestly unsubstantial as not to need further argument", then curiously proceeds to contradict that statement with thirty-five pages of argumentation. Suffice it to say that the Supreme Court, Albany County, in its order of September 23, 1980, disagreed and granted appellants' motion for a preliminary injunction on the grounds that Local Law No. 30 did violate the Constitution of the United States and on appeal the Appellate Division modified by reversing the portion granting the preliminary injunction, but otherwise affirmed, but denied appellees' cross-motion to dismiss without so much as a word adverting to the constitutional question* on which the order was based.

POINT I

Import-Export Clause

Article I, Section 10, Cl. 2 of the Constitution provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:**"

The enabling legislation for Local Law No. 30 is to be found in Section 445 of Article 18 of the Tax Law. Until the enactment of Chapter 316, L. 1960, Article 18 of the Tax Law was compatible with the Import-Export Clause.

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* Appendix 6a to Jurisdictional Statement. 80 A.D.2d 940.

Chapter 316*, L. 1960 (McKinney's Session Laws of New York, 1960, page 519) amended Article 18 so as to eliminate the inspection purpose of the statute although otherwise retaining the same general statutory pattern. After 1960 the statute was no longer compatible with the Import-Export Clause since the tax receipts from liquor were paid into the General Fund, and no longer used for inspection purposes. It had become a state tariff, duty or impost for general revenue purposes**; this was accomplished by abolition of the "state purposes fund" by Chapter 316 (§2 and §6) to which the comptroller had previously been required to transfer Article 18 receipts, to be used for the maintenance of the State Liquor Authority, the county control boards and the New York City Control Board, all of them being New York *State* control and inspection agencies.

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* Prior to Ch. 316, L. 1960, there was a "local assistance fund" in the general fund into which was to be paid all moneys from:

> "(16) article eighteen of the tax law (except moneys paid into the state purposes fund pursuant to the provisions of subdivision three of section four hundred thirty-five of the tax law.)" (Matter in brackets deleted.)

Sec. 6 of Ch. 316, L. 1960, required the above tariffs be paid into the general fund by eliminating the "state purpose fund" and the elimination of the provision requiring ("a sum equal to the total amounts audited by him within such preceding month for expenses, including personal service and maintenance, of the state liquor authority, of the county beverage control boards and of the New York City control board incurred pursuant to appropriations**") (Matter in brackets deleted.) McKinney's Session Laws of New York-1960-pages 520 and 522.

** The opinion of the Appellate Division below holds that the Local Law No. 30 is "solely revenue producing". Appendix 31a. Also appellees in their motion make the same admission that the tax is a pure "revenue measure". P. 34.

New York City has no inspection agencies, and Local Law No. 30 is in no way compatible with the Import-Export Clause. Presently, Section 435 provides that these taxes are to be disposed of pursuant to Section 171-a of the Tax Law which his no inspection purposes.

The enabling provisions for the New York City law in Section 445 were not added to Article 18 until the enactment of Chapter 406* of the Laws of 1971, Sec. 1. McKinney's Session Laws of New York—1971—page 572, and amended by Ch. 433, L. 1978, McKinney's Session Laws of New York—1978—page 741 (Metric Standards of File).

The foregoing summary of the derivation and history of Tax Law Article 18 in general and the enabling legislation in particular makes it clear that the tax involved here was intended to be a tariff and not a sales tax. It is a duty or impost on national brands including Scotch, Irish and Canadian Whiskys and others similar to the import tariffs administered by the United States Customs Service**, for there are no distilleries in all New York and no breweries in New York City. But, nevertheless, the State imposes a tax of 89.5 cents and the City 26.4 cents upon a liter of spirits which is discriminatory and burdensome upon commerce and neither of which taxes are apportioned.***

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* Introduced in the Senate (S7049) and Assembly (A8082) on Sunday, June 6, 1971, and passed both Houses the same day on Messages of Necessity from the Governor. 1971 Legislative Index, pages S683 and A788 respectively.

** Tariff schedules of United States Annotated (1981) Schedule I, part 12, Beverages.

*** "* * * But if a nondiscriminatory state tax may become discriminatory or unduly burdensome by virtue of the fact that

(Footnote continued on following page)

In summary then, New York City has no inspection powers under law; the tariffs are used for general revenue purposes and not restricted to use for "what may be necessary for executing its inspection Laws". Local Law No. 30 of 1980 is clearly unconstitutional. *Patapsco Guano Co.* v. *Board of Agriculture,* 371 U.S. 191, 195 (1898).

POINT II

Commerce Clause

The Commerce Clause in Article I, Section 8, of the United States Constitution provides:

> "The Congress shall have Power * * * To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

It was commerce that brought about the enactment of the Constitution itself in the first place because state governments had been too responsive to local economic interest, with the consequence that interstate economic competition was conducted more through political processes than through the market place. Here the enabling legislation expressly discriminated against liquor which is imported into the state in favor of wine, a domestic product, which is sought to protect by excluding it from tax. The statute is clearly tailored to accomplish its discriminatory

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(Footnote continued from preceding page)

other States also may impose a similar tax bearing upon the transaction, the possibilities for such multiplication would seem obviously to be magnified many times by the application of municipal taxes like that involved here." *Nippert* v. *Richmond,* 327 U.S. 416, 429 at n. 19.

objectives.* The legislation could not have passed, without votes from the upstate wine growing areas of the State and a Message of Necessity from the Governor.**

The appellees constantly use the words "when sold or used" within the City*** as if they have some talismanic effect in determining this case. Most recently, however, in its opinion in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 288 at p. 7 (1976), this Court again envisioned that type of tax indicated plainly its unconstitutionality:

> "Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though

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* See Appendix for relevant statutes.

** There has been a history in New York State of discrimination in favor of the domestic wine industry as evidenced by the following editorial in *The New York Times* of April 17, 1964, which also indicates their sensitivity to price differentials:

* * *

> "Earlier the Joint Legislative Committee had recommended that price controls be lifted from wine but be kept on spirits. This discriminatory approach was opposed by the wine-growers and producers in New York State, who claimed that they were being singled out as the victims in the battle for lower prices. But reversing the situation does not mean that they emerge as the victors. The state's wine-growers will end up selling less wine simply because it will be relatively cheaper to buy spirits."

*** However, "* * * no State, consistent with the Commerce Clause may impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business' Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

> operating after an 'initial sale' of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost. Nothing in the opinion in Brown v. Maryland should suggest otherwise. The Court in Brown merely presumed that at these later stages of commercial activity, state impositions would not be discriminatory."

Since the City ordinance is not protected by the Twenty-first Amendment, the importation of not only liquor, but any product, would be subject to tax in any city enacting such a tariff, and thus again create the chaotic conditions that existed under the Articles of Confederation.

POINT III

Supremacy Clause

Article VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land; • • •".

The State Liquor Authority implemented* Local Law No. 30 of 1980 by issuing Bulletin No. 529 requiring the payment of an additional 20% of the tax to the wholesalers. This was done at the behest of the wholesalers and was subsequently declared to be invalid in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863, in a separate action not involving the tax. It appears to be the contention of the appellees that since Bulletin 529 has been declared invalid, that the courts are re-

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* Appellate Division opinion—Appendix, p. 21a.

stricted to a bare-boned consideration of the tax statute by itself; rather than the skeletal form of the statute as fleshed out by application, interpretation and administration, so as to enable the Court to determine the practical effect of the statute. The decision in *Mancini* was handed down October 13, 1981, but the bulletin was not repealed until May of 1982 when it was replaced with a bulletin which permissively allowed the same practices as mandated under bulletin 529 to continue, and those practices continue to this day.

In principle, the situation is similar to that in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40, 103 S.Ct. 835, where the community enacted a ninety-day moratorium which was to be followed by a model ordinance which the plaintiff had to agree to comply with. On the eighty-ninth day, *Community Communications* secured a preliminary injunction in the Federal District Court before the 90-day ordinance expired the following day. The U. S. Court of Appeals, Tenth Circuit, reversed the judgment and order of the District Court and remanded the case on the ground that the ninety-day moratorium had expired and the model ordinance was not issue. This Court granted certiorari and reversed the court below. In a rather sharp dissenting opinion in the Court of Appeals Justice Markey said as to the issue before the Court:

> "• • • I remain sorely troubled, however, by what to me is a gnawing presence of negative pregnants.
>
> First, the majority faults the trial judge for not differentiating between the 'two principal actions' of the city. But there was no reason to differentiate. The city's actions, like a man's legs, were of equal dimension and importance in the city's scheme. Moreover, as the majority recognizes, the moratorium expired the day after the injunction is-

> sued and the trial judge did differentiate, in considering the model ordinance and refusal to deny an intent to repeat the moratorium as substantial and continuing factors, which, as discussed above, they were and are."

The majority had held that the moratorium ordinance had terminated by its terms on the ninetieth day and that the model ordinance did "not seem to be an issue in the case" id page 706. By this process of reasoning it felt there was nothing left before the Court for it to determine, so it reversed the judgment of the District Court. The Supreme Court, however, granted certiorari 455 U.S. 40 (1981) and reversed.

As noted, the Appellate Division here made the same mistake and found that the by then invalidated Bulletin No. 529 and the continuing price scheme were no longer in issue before it; so it threw it out the baby with the wash water.

There was however, still a *per se* price fixing violation as well as a pre-exemption by the Sherman Act here still to be disposed of in this action.

POINT IV

Equal Protection Clause

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall • • • deny to any person within its jurisdiction the equal protection of the laws".

The taxation of property of extra-state non-residents while exempting from taxation similar property of intra-

state residents is a violation of the Equal Protection Clause of the XIV Amendment of the Constitution, and a breach of the principle of federalism.

Wheeling Steel Corporation v. *Glander National Distillers Products Co.* v. *Glander*, 337 U.S. 562
Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (Mr. Justice Brennan Concurring)

CONCLUSION

This Motion should either be summarily dismissed or at the least, probable jurisdiction should be noted in this case.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Tax Law Sec. 445(1)(a) and (b) provides for *City* tax:

> 1. Any city in this state with a population of one million or more * * * is empowered to adopt and amend local laws imposing in any such city excise taxes on a distributor * * * at the following rates:
>
> (a) Twelve cents per gallon upon beers and
>
> (b) Twenty-six and four-tenths cents per liter on liquors described in paragraph (f) of subdivision one of section four hundred twenty-four, when sold or used in such city.

Tax Law Sec. 424(1)(a) through (f) in pertinent part imposes the following *State* taxes:

> (a) Four and four-ninths cents per gallon upon beers;
>
> (b) Two and six-tenths cents per liter upon still wines * * *
>
> (c) Seven cents per liter upon artificially carbonated sparkling wines * * *
>
> (d) Fourteen and one-tenth cents per liter upon natural sparkling wines * * *
>
> (e) Twenty-one and one-tenth cents per liter upon liquors containing not more than twenty-four per centum of alcohol by volume; and

(f) Eighty-five and nine-tenths cents per liter upon all other liquors when sold or used within this state, * * *"

* * *

It will be noted that all wine and some wine based items (b to e) are excluded from this tailored New York City enabling statute for the protection of the domestic wine industry. Only (a) and (f) were incorporated in the City legislation.